Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1285

HUGH GALLAGHER and WARD CANFIELD, individually and as Commissioners of the Civil Service Commission of the City of Minneapolis, ET AL.,

Petitioners,

vs.

GERALD CARTER, WILLIE HARRIS, HERBERT HILL III, BENJAMIN E. McHIE, and WARD K. MITCHELL, on behalf of themselves and all other persons similarly situated,

and

MINNEAPOLIS COMMISSION ON HUMAN RELATIONS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE CITY COUNCIL OF THE CITY OF MINNEAPOLIS, MINNESOTA, URGING DENIAL OF THE PETITION

KEITH M. STIDD
City Attorney
JEROME R. JALLO
Assistant City Attorney
325M City Hall
Minneapolis, Minnesota 55415
Phone: 348-2014
Attorneys for Amicus Curiae, City Council of the City of Minneapolis, Minnesota

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Pursuant to Rule 42 of the Supreme Court of the United States, as a political subdivision of a state, and with consent of the parties, which written consents have been filed with the Clerk of this Court, the City Council of the City of Min-

neapolis, Minnesota, respectfully files this brief as amicus curiae urging the Court to deny the Petition for a Writ of Certiorari.

INTEREST OF AMICUS CURIAE

The interest of the City Council of the City of Minneapolis, Minnesota, derives from its status as the governing body of the City of Minneapolis, a municipal corporation, organized under the laws of the State of Minnesota pursuant to a Home Rule Charter.

The Minneapolis City Council is comprised of thirteen Aldermen, each of whom is elected by the people who reside in the respective thirteen wards of the City.

Section 5 of Chapter 4 of the Minneapolis City Charter provides that the City Council has ". . . full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the city. . . ."

Pursuant to its power under the Minneapolis City Charter, the City Council on August 25, 1967, passed Chapter 945 of the Minneapolis Code of Ordinances, which provides in part:

> "(a) *Findings.* It is determined that discriminatory practices based on race, color, creed, religion, national origin, or sex with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations, and public services, or any of them, tend to create and intensify conditions of poverty, ill health, unrest, civil disobedience, lawlessness, and vice and adversely affect the public health, safety, order, convenience, and general welfare; such discriminatory practices threaten the rights, privileges and opportunities of all inhabitants of the city and such rights, privileges and opportunities are hereby declared to be civil rights, and the adoption of this ordinance is

deemed to be an exercise of the police power of the City to protect such rights.

(b) *Declaration of Policy and Purpose.* It is the public policy of the City of Minneapolis and the purpose of this ordinance—

(1) To declare as civil rights the rights of all persons to the fullest extent of their capacities, and without regard to race, color, creed, religion, ancestry, national origin or sex, equal opportunities with respect to employment, labor union membership, housing accommodations, property rights, education, public accommodations, and public services;

(2) To prevent and prohibit any and all discriminatory practices based on race, color, creed, religion, ancestry, national origin, or sex with respect to employment, labor union membership; housing accommodations, property rights, education, public accommodations, or public services. . . ."

Through the exercise of its police power, the Minneapolis City Council has the duty to provide for the health, safety, and general welfare of the citizens of Minneapolis. By an official Resolution passed on February 11, 1972, vetoed on February 15, 1972 by Mayor Charles Stenvig, and officially passed again on February 25, 1972, by a ten to three vote, thereby overriding the Mayor's veto, the Minneapolis City Council formally resolved:

"Whereas, the District Court in St. Louis has made a decision requiring the selecting of one minority fireman out of every three hired; and

Whereas, Minneapolis Fire Dept. leaders favor this solution to give minorities an increased opportunity to join the Fire Dept.; and

Whereas, the long delay involved in reaching this decision has resulted in a critically undermanned Fire Dept.; and

Whereas, now is the time to make a decision and resume the hiring of badly needed firemen;

Now, Therefore, Be It Resolved by the City Council of the City of Minneapolis:

That the Civil Service Commissioners be strongly encouraged to abide by the St. Louis court decision and that no appeal be made to its ruling."

By further action on March 10, 1972, by a ten to three vote, the Minneapolis City Council by motion directed the City Attorney to prepare an amicus curiae brief on behalf of the City Council in this case, ". . . said brief to be supportive of the contentions of the plaintiffs [Respondents], that the best interests of the City would be served by conclusion of the case at the earliest possible time and that the Writ of Certiorari not issue."

The Minneapolis City Council, as the governing body of the City of Minneapolis, is concerned about the health, safety, and general welfare of the citizens of Minneapolis, and it believes that those concerns will be detrimentally affected in two major ways if a Writ of Certiorari is issued:

1. The Minneapolis Fire Department is drastically undermanned, and prolonged litigation will make it difficult, if not impossible, to recruit personnel because of the uncertainty about a new employee's status pending legal review. The undermanned Fire Department poses a threat to the health and safety of the citizens of Minneapolis.

2. Prolonged litigation where long-standing racial discrimination in employment has been unequivocally proven may make recruitment of minority firemen difficult, and may upset the alleged delicate balance which exists between the minority and majority communities in Minneapolis.

ARGUMENT

United States Supreme Court Rule 19 states in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

The Rule then lists the factors the Court considers in deciding whether to grant certiorari. After reviewing these factors and reading the Petition and the amicus curiae brief of Mayor Charles Stenvig, it is embarassingly obvious that there is a glaring absence of any "special and important reasons" for granting certiorari.

The Petitioners' reasons for granting the writ may be succinctly stated as follows:

1. The seven Eighth Circuit Court of Appeals judges who decided this case on January 7, 1972 were wrong, and the two dissenting justices were right.

2. Dictum of the court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 9 S.Ct. 849, 28 L.Ed. 158 (1971), suggests that the two dissenting justices were right.

Neither the Petitioners nor their *amicus* cite one single United States Supreme Court decision or United States Circuit Court decision which is clearly in conflict with the decision in this case. *Griggs v. Duke Power Co., supra*, held that while an employer may adopt a requirement or utilize a test that will determine if an applicant is fit for the job, an employer may not, under Title VII of the Civil Rights Act of 1964, adopt an employment practice which has the effect of excluding minorities, whether intentionally discriminatory or not, unless the employment practice can be shown to relate to job performance. To cite *Griggs, supra*; for any other proposition is to cite dicum, and a conflict, if any, be-

tween dictum and the instant case is not a basis for granting certiorari under Rule 19.

After a three-judge Circuit Court panel (two circuit judges, one district judge) originally decided this case on September 9, 1971, the United States Justice Department filed a lengthy amicus curiae memorandum on behalf of the United States supporting the Petition for Rehearing and suggesting that the Circuit Court reconsider the three-judge decision, so that the Eighth Circuit would be in harmony with other circuits. In his memorandum, the United States Attorney General suggested that in light of the findings in this case and previous appellate decisions, it was not an abuse of discretion for the trial court to grant an absolute preference to 20 qualified applicants. However, as an alternative, he suggested a formula of one qualified white and one qualified minority be certified on an alternating basis until the present effects of past discrimination have been overcome. In fashioning a remedy of preference for one qualified minority applicant for every two qualified white applicants until 20 minority applicants have been hired, the Eighth Circuit Court's decision does not go as far as the United States Attorney General felt would be appropriate or legally permissible.

The Petitioners raise a specious and tangential issue when they argue the decision in the instant case conflicts with the goal of obtaining the best qualified public employees through fair and objective hiring practices.

First, in light of the findings of the trial court, it is indeed ironic for the Petitioners to now assume a posture of being interested in objective hiring practices. The trial court found that the Petitioners, as defendants, helped to maintain an all white Fire Department. They now urge this

Court, in the name of objective hiring practices, to reverse or modify a decision that will assure a minimal amount of racial integration in a previously all white department.

Second, under Minnesota law, a veteran with the lowest passing score is given absolute preference in municipal employment over a non-veteran with the highest possible score. By giving some preference to racial minority applicants who qualify by passing all examinations, we are to a small extent correcting a past wrong in the same manner we do for veterans. While veterans are easily identifiable, all the racial minority persons who were affected by the discriminatory policies of the Petitioners are not easily ascertainable. Therefore, the remedy of necessity must be fashioned to the class rather than to the individual as in the case of veterans.

Third, the Petitioners approved Minneapolis Civil Service Commission Fire Fighter Examination Plan Number 8326 in 1970, but were enjoined from hiring under that plan by the trial court. Under that plan applicants were to be divided into four groups if they passed all examinations. The first group to be hired would be veterans who had been residents of Minneapolis for one year preceding the closing of the application period. The second group to be hired would be non-veterans who had been residents of Minneapolis for one year preceding the closing of the application period. The third group to be hired would be veterans who had not lived in Minneapolis for the preceding year. The last group to be hired would be non-veterans who had not lived in Minneapolis for the preceding year.

Minneapolis, a central city with a high percentage of retired residents, contains about one-fourth of the residents of the Minneapolis-St. Paul metropolitan area. Arguably, if the Petitioners wanted the most qualified public employees

they would not grant absolute preference in initial hiring to residents of Minneapolis over higher scoring non-residents. The posture the Petitioners now take with respect to seeking the best qualified public employees is diametrically opposite from what they actually did in adopting Examination Plan 8326 prior to this case and from what they were found to have done in the past by the trial court.

CONCLUSION

The Petitioners and their *amicas* have failed to demonstrate the existence of any special or important reasons to justify the issuance of a writ of certiorari in this case.

The decision of seven out of nine Eighth Circuit Court of Appeals Justices in this case is in harmony with previous decisions of the United States Supreme Court and the United States Circuit Courts, and follows a suggestion of the United States Justice Department as contained in its amicus curiae memorandum on behalf of the United States filed with the Eighth Circuit in support of the Petition for Rehearing.

When blatant racial discrimination in employment has affected a class over a period of many years, a trial judge has wide discretion to implement an effective remedy. The remedy in this case is designed to integrate an all white department with fully qualified minority firemen. In view of past practices, the lower courts determined that the only way to do so was to assure some minority applicants that they would be hired if they qualified irrespective of previous discriminatory practices, veterans preference, and residency rules. Since the lower courts did not abuse their discretion their decision should stand.

This case is unique to the City of Minneapolis, and as such will not arise again and will not have universal applicability.

For these reasons a Writ of Certiorari should not issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

KEITH M. STIDD
City Attorney
and
JEROME R. JALLO
Assistant City Attorney
325M City Hall
Minneapolis, Minnesota 55415
Phone: 348-2014
Attorneys for Amicus Curiae,
City Council of the City of
Minneapolis, Minnesota